No. 87-208

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

RAYMOND MIRRER,

Petitioner,

-against-

QUASLIM INHAM, Warden, North Facility, Department of Correction,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

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PRELIMINARY STATEMENT

Petitioner Raymond Mirrer seeks a writ of certiorari to review a judgment rendered November 25, 1986, by the United States Court of Appeals for the Second Circuit. By that judgment, the Court of

Appeals unanimously affirmed a judgment entered June 20, 1986, in the United States District Court for the Southern District of New York (the Honorable Leonard B. Sand, J.), denying Mirrer's petition for a writ of habeas corpus.*

Mirrer had sought to set aside a judgment rendered June 10, 1983, in New York State Supreme Court, New York County (the Honorable Benjamin Altman, J.). By that New York judgment, Mirrer had been convicted after a jury trial of ten counts of Offering a False Instrument for Filing in the First Degree (New York Penal Law §175.35) and one count each of Conspiracy in the Fifth Degree (New York Penal Law §105.05) and violating New

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*The Court of Appeals' opinion in this case (5a-10a) is unreported. Parenthetical references followed by 'a' are to the appendix to Mirrer's petition.

York's Martin Act (New York General Business Law §352-c[2]). Mirrer was sentenced to concurrent terms of six months imprisonment and four years six months probation on the false filing counts, and five years probation on the conspiracy and Martin Act counts. Mirrer has completed his term of incarceration and remains on probation.

STATEMENT OF THE CASE

Mirrer's Participation in Tax and Securities Fraud

Mirrer's conviction was based on his participation in 1979 and 1980 in a massive tax and securities fraud. Early in 1979, the Securities and Exchange Commission ("SEC") began investigating coal mining ventures, known as "programs," marketed as tax shelters by Richard Firestone and Milton B.

Dorison, doing business as Amity Financial ("Amity"). After commencement of the SEC investigation, Firestone and Dorison carried out a fictitious sale of Amity's assets to International Venture Capital ("IVC"), a company newly founded to take over Amity's coal tax shelter business. The transaction included "consulting" and "non-competition" agreements providing for payments by IVC to Firestone and Dorison of more than $5,700,000 each (GREGORY KATZ: 2149-53, 2160-61, 2168, 2176-81, 2188-93, 2229-30*; Assets Purchase, Consulting and Non-Competition Agreements, Exhibits 248 AA, 39A, B, J and K).

In July 1979, Firestone met with petitioner Raymond Mirrer, an

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*Parenthetical references are to the minutes of Mirrer's trial unless otherwise indicated.

attorney, licensed engineer and certified public accountant (STANLEY FOX: 1799; Ryan: 4611). Firestone was looking for New York counsel to take over work which had been done by a Miami law firm. He showed Mirrer a tax opinion prepared by the Miami firm and used in Amity's 1978 coal offerings. Mirrer reviewed the tax opinion and other materials and, that same afternoon, agreed to work for Firestone (Ryan: 4468, 4571-72, 4574, 4619-20; Connor: 7351-52, 7424; Mirrer Grand Jury Statement: 8070-71). Peter Gettinger, the president of IVC, formally retained Mirrer the next day and paid him $5,000 (Mirrer Grand Jury Statement: 8072).

Beginning in August 1979, IVC promoted sixteen coal tax shelters, in the form of limited partnerships. Firestone and Dorison retained control of

IVC's programs, and investors' cash contributions to the partnerships were funnelled to them pursuant to their consulting and non-competition agreements with IVC, but their involvement was not disclosed to investors. Mirrer's law firm was retained to sign a tax opinion for the IVC programs, to produce private placement memoranda for those programs, and to verify representations in the memoranda (Ryan: 4471-72, 4620-21, 4714-15). Firestone showed Mirrer the assets purchase and related agreements between Amity and IVC (Mirrer Grand Jury Statement: 8073). A schedule attached to the purchase agreement disclosed the pending SEC investigation (Katz: 2198-2203; RICHARD RUBIN: 2409; Exhibit 248AA, Schedule 4[e]).

After his retention by Firestone and Gettinger, Mirrer produced

a placement memorandum for IVC's Independence coal program (Ryan: 4575-77; Mirrer Grand Jury Statement: 8072-73; Memorandum, Exhibit 136A). This memorandum was virtually identical with memoranda produced for Independence and an earlier Amity program by Amity's Miami law firm (Ryan: 4574, 4776-77, 4786; Aries Placement Memorandum, Exhibit 17). Mirrer added several paragraphs to the tax opinion in the memorandum, (Exhibit 136A, Tax Opinion, pp. 15-17, 18-19, 40-41, 49, 52-53), but he later admitted to his associate PETER T. CONNOR that the Miami firm had been the source of the tax opinion (Connor: 7353).

Mirrer's Independence memorandum (Exhibit 1) was distributed to investors in the Independence program and ultimately to investors in fifteen subsequent IVC programs (MICHAEL

DONOGHUE: 501; Ryan: 4577-78, 4786-88; LOUIS W. SIEGEL: 4958-59, 4969), with changes introduced to reflect the different properties involved in each program and the specific economic projections for each (Memoranda, Exhibits 2-16; Donoghue: 941). The Independence memorandum, like the subsequent fifteen, identified IVC as the promoter of the coal offerings, without mentioning Firestone or Dorison. The memorandum represented that the program would mine large amounts of coal, some 44,000 tons per month, but did not refer to the fact that Amity's 1978 and 1979 programs had failed to mine coal.

The memorandum included a sublease of the mining rights on Kentucky property controlled by IVC, providing for payment of a "minimum annual royalty" of $2,374,716 by the Independence limited

partnership to IVC. The royalty was payable, partly in cash and partly by a promissory note, beginning in 1979. According to the memorandum, 72% of the funds invested in the program would go to IVC in payment of the cash portion of the minimum annual royalty for 1979. Only 5.9% of the investors' contributions was set aside for working capital. Since no mining was projected for 1979, the minimum annual royalty would result in substantial business losses to the partnership for that year.

The memorandum also provided that investors in the program might, at their option, borrow up to three times their capital contributions to the partnership from a lender controlled by Firestone, and contribute the borrowed money to a so-called "insurance reserve" ostensibly designed to indemnify the

general partner against excess insurance claims.

The Independence memorandum's tax opinion, signed by Mirrer's law firm,* stated that the minimum annual

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*The tax opinion was printed on Mirrer's letterhead. The letterhead listed five members of Mirrer's firm, Mirrer, Philip Lerner, Edward Ryan, Marvin D. Yaker, and Howard C. Kochman (Tax Opinion, p. 1; Donoghue: 405; Ryan: 4579-80; Safran: 6943). However, Ryan maintained his own practice in Albany and assisted Mirrer only part-time (Ryan: 4460, 4463-64, 4469-70, 4509-10, 4609-12, 4663, 4676-77, 4738; Mooney: 6715), and Lerner had ceased to be active in the firm (Ryan: 4587). Yaker too had his own practice and merely used Mirrer's office (Ryan: 4587; Mooney: 6715; Safran: 7156; Connor: 7342). The letterhead listed five other attorneys, O'Neil, Friedman, Hartstein, Lampert, and Wallace, as "of counsel" to Mirrer's firm (Tax Opinion, p. 1; Ryan: 4580). Ryan had never met O'Neil and knew nothing about Wallace (Ryan: 4587-88). Lampert practiced in Florida (Ryan: 4794-95). In addition to Mirrer's offices at 750 Third Avenue, the letterhead listed Ryan's office in Albany, Kochman's in California, Kochman's and Friedman's in Washington, D.C., Hartstein's in New Jersey, and Lampert's in Florida.

(continued...)

royalty payment for 1979 was a deductible

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*(...continued)

EDWARD B. SAFRAN was an officer of Advance Construction Company, the general partner of ten IVC partnerships. Mirrer told Safran that he had had extensive experience in tax and securities law (Safran: 6926, 6942, 7057-58, 7249). In fact, while Mirrer had handled the issuance and transfer of stock, he had done so only for a private corporation not registered with the SEC. Mirrer did not issue prospectuses and did not prepare tax returns for that corporation (STANLEY FOX: 1778-79).

Mirrer also told Safran that he had had a firm for a number of years and currently had eight or ten associates (Safran: 6942-43). In fact, Mirrer had founded the firm with Ryan and Lerner in summer 1978 (Ryan: 4463, 4692, 4713, 4741, 4803, 4806-08). The firm's first office consisted of one small windowless room in a midtown suite; the firm shared a library and receptionist with other lawyers (Ryan: 4582-83; Mooney: 6718-19, 6745; Connor: 7345-46, 7475-76). During the days Mirrer worked for a retail store (Fox: 1776-78), using the office only at night. Philip Lerner worked full-time for an accounting firm, and Ryan was beginning a separate practice in Albany at the same time, so there was seldom anyone in the office during business hours (Ryan: 4460, 4569-70, 4583-84, 4609-12).

business loss, and that both the investors' capital contributions to the program and their contributions to the insurance reserve were "at risk" for federal income tax purposes. As a result, each investor could deduct his pro rata share of the minimum annual royalty on his personal federal income tax return, up to the total of his capital contribution and his contribution to the insurance reserve.

Professor BORIS I. BITTKER of the Yale Law School testified as an expert in federal income tax law that the IVC coal programs were "abusive" tax shelters, designed primarily to generate tax deductions, and that no conscientious and informed tax lawyer would disagree (Bittker: 5316-19, 5389-91, 5401-02, 5469-71, 5480-82, 5519-20, 5533-34, 5542-50, 5567-68). According to Professor

Bittker, the minimum annual royalty represented an excessive and unjustifiable mark-up--in some programs up to 900 times IVC's own expense for rights to the subleased properties*--and

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*For example, IVC had leased mining rights to property in the Kenona program for $3.00 per acre and subleased them to the Kenona limited partnership for $2,700.00 per acre, a mark-up of 900 times the original outlay (Bittker: 5321-22). CLYDE VAN HOOSE, an agent of IVC, had leased mineral rights over 4,000 acres owned by the Lick Creek Mineral Trust for $3.00 per acre or 10% of the selling price of any coal mined or sold (SMITH R. ARMSTRONG: 2943-49, 2954-56, 2968, 2985, 2989-90, 2993-96, 3003; HOWARD QUEEN: 3025-26; Van Hoose: 3896, 3986, 4102-03; Lease, Exhibit, 210-O1A, paras. 1-3, 9). Van Hoose assigned his rights to IVC for $80,000 (Van Hoose: 3963-64, 3977; Check, Exhibit 182F; Ledger, Exhibit 41A, p. 143; Assignments, Exhibits 210-N3 and 210-O3; Nova and Gotham Placement Memoranda, Exhibits 14 and 15, p. 27), and IVC then subleased the rights to the Nova and Gotham partnerships at a total minimum annual royalty of $3,390,695, or over $800 per acre (Van Hoose: 4098-99, 4102; Stipulation: 4100; Subleases, Exhibits 210-N2 and 210-O2, pp. 1, 2, 9), more than 260 times Van Hoose's original outlay.

the Internal Revenue Service and the courts would not accept the good faith of this markup (Bittker: 5321-28, 5483-94, 5573). For this and other reasons, contrary to Mirrer's tax opinion, the minimum annual royalty was not a deductible business loss (Bittker: 5329-40, 5510-15).

Further, Professor Bittker testified that the so-called insurance reserve was not a bona fide business arrangement but a device for generating tax deductions (Bittker: 5347-55, 5467-69, 5545-46). Among other defects in the insurance reserve, investors were permitted under the limited partnership agreement to withdraw their reserve funds even after occurrence of the events ostensibly insured against. This clause in the partnership agreement created a "stop loss" arrangement which--contrary

to Mirrer's tax opinion--precluded a finding that contributions to the insurance reserve were "at risk" (Bittker: 5355-66, 5573-76).

For all these reasons, in Professor Bittker's opinion, business loss deductions taken pursuant to the IVC programs were invalid under federal tax law (Bittker: 5360, 5389, 5713-14).* A business loss deduction which was invalid on the taxpayer's federal tax return would also be invalid on his New York return; its effect would be to decrease the taxpayer's New York taxable income (BENJAMIN GALUB: 6581-83).

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*PAUL GOLDBERG, a New York attorney, testified for the defense as an expert in federal and state income tax law, in opposition to Professor Bittker's opinions (8137-75, 8217-44, 8265-73, 8292-8360, 8381-8418, 8427-39, 8450-96, 8503-08, 8514-16, 8522-53, 8563-66, 8642-72, 8682-8714).

In August and September 1979, Mirrer hired five young attorneys, including EDWARD MOONEY and Peter T. Connor, to work on the coal programs (Ryan: 4485, 4584-88, 4676, 4733, 4736, 4841-44; Mooney: 6713-15, 6828; Connor: 7341-43, 7420, 7469; Memorandum, Mirrer Exhibit M.). Mirrer told Mooney and Connor that his law firm did tax and SEC work (Mooney: 6714; Connor: 7340, 7419-20); later he told Connor that he had "heavy SEC experience" (Connor: 7348).

Mooney and Connor's job was to put together the placement memoranda (Mooney: 6715, 6764; Connor: 7374, 7412, 7476). They used a master document, changing names, dates, and figures for particular memoranda with a word-processor (Mooney: 6715-16, 6767; Connor: 7345). The work was divided informally (Connor: 7420-21, 7449), but Mirrer was

the "boss" (Mooney: 6767-68, 6776; Connor: 7449-50). Mooney and Connor did not research the validity of the tax opinion; they only changed facts and figures in the opinion as required for the different programs (Mooney: 6719). Mirrer and another associate, EDWARD RYAN, made some changes of a legal nature in the tax opinion, and Mirrer made some changes to simplify it (Mooney: 6744-45, 6760, 6768; Connor: 7352-53).

Mooney and Connor had no authority to make editorial changes in the memoranda (Mooney: 6716; Connor: 7344). At one point, Edward Safran, an official of the corporate general partner for ten programs, suggested a change in the programs' insurance policy; but Firestone told Connor, "You guys don't make any changes without my consent." Connor told Mirrer of this conversation

(Connor: 7364-66). Eventually, Connor realized that Firestone and Dorison were involved in the programs. He said to Mirrer, "[T]hese guys are involved, who are these guys[?]" (Connor: 7356-57). Mirrer told Connor that Firestone was a consultant to the general partners (Mooney: 6728, 6733; Connor: 7351).

From August through December 1979, Mirrer's firm produced fourteen placement memoranda (Exhibits 2-15). None of the memoranda identified Firestone and Dorison as promoters of the programs. All the memoranda continued to represent that the programs would mine substantial amounts of coal, up to 528,000 tons annually (734; Exhibits 1-15, Economic Projections). They all contained Mirrer's tax opinion representing the deductibility of the enormous royalties paid by the

partnerships to IVC, and stating that the investors' contributions to the "insurance reserve" were "at risk" under federal tax law.

Firestone's liaison Herman Friedman was charged with overseeing Mooney's and Connor's work (Mooney: 6718, 6720, 6767, 6829-30; Connor: 7370-71, 7382). In August 1979, Friedman supplied Connor with the following language to be inserted into the memorandum for the Princess coal program, in the section entitled "Risk Factors" (Connor: 7353-55,7422):

> Major Management Corporation/Prior Coal Programs- Major Management Corporation ("MMC"), a registered broker/dealer, has been retained by the General Partner to render certain services in the marketing of the Partnership's units. (See "Use of Proceeds"). In 1978 and 1979, MMC assisted in the marketing of numerous coal programs similar to the program

> offered by the General Partner hereunder. Of such programs, three (3) have temporarily suspended mining activities due to the present economic conditions of the coal industry. MMC has been informed that all three programs intend to resume full mining activities as the coal market becomes more favorable for the coal of those programs (Donoghue: 620-23, 628-29; Chart, Exhibit 221).

This statement appeared as Risk Factor 12 in the Princess memoranda and Risk Factor 13 in the following eleven memoranda (Donoghue: 622-23). The memoranda made no reference to the fact that, besides the three 1978 and 1979 coal programs which had "temporarily suspended mining activities," thirty-two other 1978 and 1979 programs had never begun to mine coal.

Mirrer, Firestone and Friedman all discussed this statement (L. Siegel: 4882, 4884, 4920, 4965; Mooney: 6739-40,

6833: Connor: 7355-56). Peter Connor felt the statement was misleading and communicated his feeling to Mirrer, but Mirrer overruled him, remarking, "[I]t's going in like that" (Connor: 7356-57).

Between August 1979 and April 1980, Mirrer's associate Edward Ryan made five trips to Kentucky to verify information in the placement memoranda and check a sampling of IVC's coal leases (Ryan: 4477-78, 4481, 4496, 4623-25, 4645; Connor: 7465). Ryan acted as Mirrer's "eyes and ears" in Kentucky (Ryan: 4653, 4739); after each trip, he wrote a report and discussed it with Mirrer (Ryan: 4479, 4486, 4505, 4601, 4630, 4641-42, 4652-53, 4690-91; Connor: 7401, 7427-28). Ryan increasingly perceived serious problems with the absence of progress toward mining in the IVC programs, as well as with the failure

of Amity's earlier programs to mine coal (Ryan: 4484-86, 4497-98, 4502-09, 4513, 4522-30, 4536-39, 4551-52, 4563-64, 4592, 4601, 4601, 4627, 4648-52, 4656-61, 4669-72, 4681-82, 4701, 4771; Reports, Exhibits 141A and B, 135A and B).* After

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*After Ryan's October 1979 visit to Kentucky, Mirrer told Ryan that people in Kentucky had complained that Ryan was acting "too much like a prosecutor . . . asking hard questions to these people and they're getting nervous" (Ryan: 4525-26, 4681-82).

A few weeks later, in mid-November 1979, Firestone angrily ordered Ryan to cancel a trip Ryan had planned to take to the Bahamas, the Netherlands Antilles, and Guernsey to prepare a "due diligence" report on Columbus Trust Company, the source of funds for the insurance reserve, and Advance Construction Company, the general partner for ten coal programs. Firestone told Ryan that he could not call the people in Curacao "point blank" and intrude on them "like a bull in a china shop" (Ryan: 4540-43, 4683-84, 4688, 4747-51; Mooney: 6779; Connor: 7466, 7481). Ryan "bit [his] lip," realizing that Mirrer would not allow him to take the trip over Firestone's objection (Ryan: 4543). Mirrer sympathized with Ryan's

(continued...)

a last visit to Kentucky in April 1980, Ryan reported his conclusions to Mirrer:

> The coal situation is serious and it concerns me. I believe that we should establish a time certain for the production of some coal, e.g. September 1, 1980. If no coal has been produced from any of the 15 programs closed in 1979, we must (1) disclose that fact and (2) seriously reassess our involvement. The only approach that I can recommend is to wait and see, but frankly, I am not optimistic (Ryan: 4774-76, 4809-10; Report, Mirrer Exhibit K).

Some 472 investors invested $8,114,144 cash in fifteen IVC coal programs. Virtually all these investors

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*(...continued)
displeasure, but insisted that he had "to strike a balance between keeping the client content and getting the job done." Mirrer told Ryan, "Don't worry. We'll get the job done in some other manner" (Ryan: 4549-51, 4599-4600, 4685, 4689-90). But no lawyer from Mirrer's firm ever went to the Bahamas or the Netherlands Antilles to verify representations in the placement memoranda about Columbus Trust or Advance Construction (Ryan: 4540, 4544).

borrowed additional funds totalling $24,193,201 to contribute to the "insurance reserve." In early 1980, investors in fourteen IVC programs received forms showing their pro rata share in limited partnership business losses (NATHAN GORDON: 2559-62; ARTHUR FRIEDMAN: 2742-44, 2747-48; Exhibits 23A-F, H-J, L-P). Eleven named investors, who had invested from $6,000 to $200,000 in nine programs, filed New York State income tax returns for 1979 claiming deductions of four times their investment (Stipulation: 6611-13; JOHN MIENIK: 6347-48, 6369-71, 6388-90, 6412, 6420-21; DAVID LINKER: 6494-6500, 6511-12, 6550; Tax Returns, Exhibits 80A and B, 82A, 83-86, 87A-89). These investors believed the programs were valid tax shelters and would not have invested in an invalid shelter (Stipulation: 6614; Mienik: 6359,

6368-69, 6377-82; Linker: 6493-94, 6513-14, 6576-77).

On June 18, 1980, Mirrer produced a supplement to the placement memorandum for the Mayfair program containing a new Risk Factor 13:

> Prior coal programs. Major Management Corporation ("MMC"), a registered broker-dealer, has been retained by the General Partner to render certain services in [marketing] the Partnership's units. MMC assisted in the marketing of numerous coal programs in 1978 and 1979 similar to the program being offered. Engineering and preliminary work has been completed in many of the programs in order to obtain various State and local permits. Of the 1978 programs, three (3) have temporarily suspended mining activity due to the present economic conditions of the coal industry and the others have not commenced mining. In 1979, International Venture entered into sublease agreements with several limited partnerships which were organized with the assistance of MMC whereby coal is to be mined under subleases similar to the arrangements in

> The Mayfair Coal Program. Such partnerships are in various stages of preparation to obtain permits, however, none to date have commenced mining (Ryan: 4776-77, 4781; ARTHUR SELIGMAN: 6326-29; Mooney: 6822-23; Connor: 7432-33; Mirrer Exhibit O, MA108).

This statement was also included in the Barbizon memorandum, the seventeenth and last memorandum Mirrer's firm produced (Ryan: 4783; Seligman: 6332-33; Mooney: 6749, 6823-24; Connor: 7378-79, 7483, 7489; Stipulation: 6334-35; Mirrer Exhibit P). Risk Factor 13 had been a bone of contention between Mirrer and Firestone through the spring of 1980 (Connor: 7490, 7494-96), but Firestone agreed to the new language (Connor: 7434, 7498).

By the end of June 1980, when IVC's Mayfair program closed, Mirrer and Firestone were in open conflict, most importantly over Mirrer's fees (Donoghue:

525-26; Connor: 7360, 7377, 7379, 7490-92, 7494-96). Mirrer refused to produce a closing book for Mayfair, on the grounds that he had not been paid for the placement memoranda he had produced (Donoghue: 514-15, 525-28; Mooney: 6748). In July 1980 Peter Gettinger, the president of IVC, withdrew the Barbizon program, closed down IVC, and "fired" Mirrer's firm (Mooney: 6749-50; Connor: 7491).

By this time, Mirrer's firm had been paid $343,513 from the investors' cash payments, plus an additional $77,000 from IVC (ALEXANDER PARKS: 7641, 7647-48, 7702-03, 7712, 7719-34, 7778-7808, 7815, 7943-46, 7994-96; Mirrer Exhibits VV1-15, WW1-4, ZZ). IVC had also paid $2,050,000 to Firestone and $2,030,000 to Dorison (Parks: 7651, 7656-57, 7662-63, 7690-92).

In August 1980, Mirrer sued IVC, Amity, and Firestone (Connor: 7407-08, 7413-15, 7490). Mirrer's complaint and Firestone's answering Affidavit in Opposition, read in redacted form at the trial (4592-98, 7409-12), spelled out the relationships among Firestone, Amity, IVC, and Mirrer. Among other things, Mirrer alleged:

> 57. Due to investigations conducted and presently being conducted by governmental agencies in connection with Firestone's activities in limited partnership coal programs, on or about July, 1979, Firestone entered into an agreement whereby certain assets controlled by him were sold to IVC, a newly-formed corporation.
>
> 58. In connection with the sale of certain assets to IVC relating to coal programs controlled by Amity and Firestone, Firestone entered into several agreements, including a consulting agreement and an agreement not to compete, whereby Firestone and Dorison were each to

> receive in excess of $5 million each.
>
> * * *
>
> 60. During the 1979 period, funds raised by MMC [Major Management Corporation] for the benefit of IVC on the coal programs handled by plaintiff amounted to over $8 million, of which approximately $6 million was paid to IVC as advance royalty payments (Connor: 7407-08; 7409-12; Exhibit 34A).

Firestone's Affidavit in Opposition stated:

> 3. I wish to point out and strongly emphasize that I have never been a client of the Plaintiff. I had acted as a consultant to INTERNATIONAL VENTURE CAPITAL, LTD. ("INTERNATIONAL VENTURE"), and I do know that INTERNATIONAL VENTURE had a relationship with the plaintiff. However, I have never owned any stock nor had any other proprietary interest in INTERNATIONAL VENTURE, nor have I ever been an officer or employee of that corporation.
>
> * * *
>
> 8. The Plaintiff's first offering memorandum on behalf of INTERNATIONAL VENTURE was

> almost a word-for-word copy of an offering memorandum given to the Plaintiff by the Florida law firm.
>
> * * *
>
> 28. The Memorandum was one in a series of 15 or 16 memoranda prepared by Plaintiff and its predecessor, Mirrer, Lerner & Ryan, all of which are virtually identical with the exception of some minor revision work. Even the tax opinion was originally copied by the Plaintiff from that supplied to it by the Florida law firm through my efforts. As hereinabove stated, there were about 45 identical offering memoranda produced by other law firms prior to Plaintiff's involvement with the INTERNATIONAL VENTURE, and the offering memoranda produced by Plaintiff were virtually identical to those (Exhibit 127A; 4592-98).

Mirrer's Indictment, Trial and Appeal

In January 1982, a New York County grand jury handed up a twenty-five count indictment charging Mirrer and his co-defendants with Grand Larceny in the

Second Degree (New York Penal Law §155.35), Scheme to Defraud in the First Degree (New York Penal Law §190.65), Offering a False Instrument for Filing, and Conspiracy. The defendants were also charged with violating New York's Martin Act, which prohibits all frauds and deceptions in the sale of securities. New York County Indictment No. 116-82.

Mirrer's trial began in New York State Supreme Court on January 23, 1983, and lasted three months, producing a trial record of some 10,300 pages. The jury heard fifty-six witnesses and viewed hundreds of exhibits totalling more than 100,000 pages. On April 19, 1983, the jury found Mirrer guilty on ten counts of Offering a False Instrument for Filing and one count each of Conspiracy and violating the Martin Act. Mirrer was acquitted of twelve counts of Grand

Larceny in the Second Degree and one count of Scheme of Defraud in the First Degree. On June 10, 1983, Mirrer was sentenced as noted on page 2 above.

On June, 25, 1985, the Appellate Division of the New York State Supreme Court affirmed Mirrer's conviction, holding that the evidence "fully support[ed] the verdicts" against Mirrer and his co-defendants, and that Mirrer's contentions on appeal "lack[ed] merit." People v. Firestone, 111 A.D.2d 696, 698 (1st Dept. 1985). On August 2, 1985, Mirrer was denied leave to appeal to the New York Court of Appeals by the Honorable Vito J. Titone, Associate Judge of that court. 65 N.Y.2d 984. On August 14, 1985, the trial court (the Honorable Carol Berkman, J.) denied without a hearing Mirrer's motion to vacate his

conviction pursuant to New York Criminal Procedure Law Section 440.10.

The Federal Proceedings

Mirrer filed the instant habeas corpus petition on September 3, 1985. On June 20, 1986, Judge Sand denied Mirrer's petition (21a-94a), and on November 25, 1986, the Court of Appeals for the Second Circuit unanimously affirmed (5a-10a).

Mirrer's petition for certiorari does not state clearly and concisely the claims for which he seeks review. However, the petition can be read as asserting five claims which Mirrer asserted in the courts below: (1) that the trial evidence was insufficient to establish beyond a reasonable doubt the mental elements of the crimes of which Mirrer was convicted (P8-13, 23,

25, 29*), (2) that the trial judge improperly denied him a severance (P14), (3) that his attorney John Wall labored under a conflict of interest (P14-15, 17-18, 26), (4) that Wall represented Mirrer ineffectively at the trial, especially by delivering an inadequate summation (P15-16, 18-22, 25-29), and (5) that the prosecutor misrepresented the evidence in his summation (P14, 19, 27).

ARGUMENT

Reasons for Denying the Writ

1. As a general rule, certiorari is granted only when there are special and important reasons for granting it, for example, in cases of conflict among decisions of the lower courts or when the lower courts have

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*Parenthetical references preceded by 'P' are to Mirrer's petition.

decided important questions of federal law which have not been, but should be, settled by this Court. See Rules of the Supreme Court of the United States (1980), Rule 17. The purposes of certiorari are not served by review in this Court of decisions which involve no conflict among the lower courts, and which present no novel or unresolved issues of law, but turn instead on the application of established principle to particular factual situations. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

Mirrer, however, seeks certiorari in a case involving no legitimate dispute over legal principles. The main contention for which Mirrer seeks review is that the trial evidence

was insufficient to establish the mental elements of the crimes of which he was convicted (see P8-13, 23, 25, 29). The jury found otherwise, and in affirming the jury's finding, the Court of Appeals recognized the controlling principle of law, that "according to Jackson v. Virginia, 443 U.S. 307, 319 (1979), a habeas claim will succeed only if no rational trier of fact could have found proof beyond a reasonable doubt" (9a). Mirrer does not question this principle or cite any conflict or ambiguity in its judicial interpretations; his only claim is that it was applied incorrectly in this case. This claim is inadequate basis for granting certiorari. It would not serve the purpose of the writ for this Court to canvass the record once again and weigh the evidence to determine whether the jury could rationally find

that Mirrer's mens rea was established beyond a reasonable doubt. Ross v. Moffitt, 417 U.S. 600, 616-17 (opinion of the Court), 620n. (Douglas, J., dissenting) (1974).

In any event, the trial evidence overwhelmingly supports the jury's determination. To convict Mirrer of Offering a False Instrument for Filing in the First Degree, the jury had to find not only that investors in the IVC programs filed New York State tax returns claiming invalid deductions, but also, as specific elements of mens rea, that Mirrer intentionally aided in the filing, that he knew the tax shelter was abusive and his tax opinion invalid, and that he specifically intended to defraud the State of New York. Penal Law §§175.35, 20.00. Unquestionably, the evidence

established these elements beyond a reasonable doubt.

Most prominently, Professor Bittker gave expert testimony that the tax shelter was so seriously and obviously defective that no conscientious and informed tax lawyer would endorse it. And Risk Factor 13, which Mirrer inserted in the placement memoranda, grossly misled investors by suggesting that Amity's prior coal programs were all mining coal except for three which had "temporarily suspended mining activities," when in fact thirty-five Amity programs had never mined coal at all. Further, Mirrer's placement memoranda deceitfully failed to identify Firestone and Dorison as promoters of the IVC coal programs, although they controlled the entire operation and realized millions of dollars from the

programs' sale, as Mirrer was well aware. And Mirrer did not in fact write the tax opinion which he signed, beyond introducing minor changes, but agreed to sign it after only a brief review of a nearly identical opinion.

There was compelling additional evidence of Mirrer's bad faith. He circulated the tax opinion under a letterhead which misrepresented the size and nature of his law firm, and he misrepresented the history of his firm and falsely held himself out as a lawyer with extensive tax and securities experience. In addition, Mirrer was fully informed by Edward Ryan of serious problems in coal operations in Kentucky. But he ignored his "due diligence" obligation to warn investors of these problems, and instead continued to circulate the placement memoranda as if

they did not exist. He even relayed to Ryan complaints from Kentucky that Ryan was acting "too much like a prosecutor" in his due diligence investigations. Mirrer portrays himself as the "innocent victim" of Firestone, Dorison and Gettinger's "scam" (P8; see also P3-4, 14), but the evidence rules out any doubt that Mirrer played an essential role in the "scam" and knowingly misrepresented the facts.

Mirrer's specific intent to defraud the State was also well established. Mirrer knew that investors in the coal programs would file New York State tax returns claiming the invalid deductions his tax opinion promised: that they would do so was essential to the scheme's success, since the programs were marketed as tax shelters, and to the success of future programs with which

Mirrer could be associated. Under these circumstances, the jury could find that Mirrer was not indifferent to the false filings, but had an interest in their taking place and specifically intended that they occur.

The evidence also ruled out any reasonable doubt that Mirrer made false representations in violation of New York's Martin Act, which prohibits any fraudulent or deceptive statement in the sale of securities. New York General Business Law §352-c(1) and (2). The best examples are Risk Factor 13 and Mirrer's statements in the tax opinion that the minimum annual royalty was deductible and that funds contributed to the insurance reserve were "at risk." Finally, these latter statements, together with Mirrer's grand jury statement recounting his first contact with Firestone and his retention

by Gettinger, established beyond a reasonable doubt that Mirrer agreed with his co-conspirators to distribute the tax opinion. This evidence, combined with the evidence demonstrating Mirrer's specific intent to defraud the State, was sufficient to support Mirrer's conviction for Conspiracy in the Fifth Degree, New York Penal Law §105.05(1), i.e., conspiracy to commit the crime of Offering a False Instrument for Filing.

In sum, there is simply no doubt that the jury correctly found the mental elements of Mirrer's crimes established beyond a reasonable doubt, and no reason for this court to review those findings.

2. Mirrer also contends that his attorney John Wall labored under a conflict of interest and in any event represented him ineffectively at the

trial, that the prosecutor distorted the evidence in summation, and that the trial judge improperly denied him a severance. These claims are equally inappropriate bases for granting certiorari. Here, too, the Court of Appeals resolved Mirrer's contentions by reference to settled legal principles, and Mirrer in opposition asserts nothing more than that the Court of Appeals erred in applying these settled principles to his case.

With respect to Mirrer's ineffective assistance claim, the Court of Appeals pointed to the controlling standard, that "[a] claim of ineffective assistance of counsel . . . will prevail only if an attorney's performance is so deficient that it created 'a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt[,]' Strickland v.

Washington, 466 U.S. 668, 695 (1984)," and found that Mirrer had not met this standard (6a-7a). Nothing in Mirrer's criticism of Wall's performance (P15-22) suggests with any degree of plausibility that the jury would have conceived a reasonable doubt but for Wall's alleged deficiencies. Indeed, Mirrer's position depends largely on his simple claim of innocence: he argues that "Wall must have committed unprofessional errors" merely because the jury did not conceive a reasonable doubt (P30; see also P8, 28-29). This argument is a non-sequitur. Moreover, it overlooks the fact that Wall did obtain Mirrer's acquittal on the counts of Grand Larceny and Scheme to Defraud despite the overwhelming evidence of Mirrer's fraudulent intent.

As for Mirrer's claim that Wall's summation was constitutionally

inadequate (P12, 14, 18-20, 27-29), Wall devoted virtually his whole summation to the critical theme that the evidence had not established Mirrer's criminal intent. He drew effectively on testimony portraying Mirrer as a competent and diligent lawyer who had acted in good faith and earned the witnesses' admiration and respect (9374, 9376, 9385-89, 9391-92, 9400, 9408-11), as well as on the evidence tending to show that Mirrer had conscientiously carried out his "due diligence" responsibilities (9392-96, 9399, 9401-05, 9413-18, 9423). Mirrer's attack on Wall's summation cannot be sustained when compared with Wall's performance.

The Court of Appeals rejected Mirrer's conflict-of-interest claim on the ground that Mirrer had voluntarily consented to the arrangement by which

Wall was paid by Mirrer's co-defendants, as Mirrer himself unequivocally stated during the trial (6850-54), although he could have had court-appointed counsel (7a-8a). Here, too, the Court of Appeals cited the controlling standard, that "'a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance[,]' Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980))" and found that standard unmet (7a-8a). Mirrer opposes nothing to this finding except his assertion that the Court of Appeals was wrong. But even the most superficial examination of the trial record confirms that Wall acted independently on Mirrer's behalf and was zealous in his defense, as Mirrer himself admitted in his brief to the Appellate Division (Brief for Defendant-Appellant

Raymond Mirrer, p. 81). As the Court of Appeals noted (8a), Wall clearly articulated in summation that he was Mirrer's attorney (9374), and he argued emphatically that Mirrer was innocent (9384-85, 9399, 9430-31).

Mirrer's claim that the prosecutor distorted the evidence in summation by contending that Mirrer engaged in fraud (P14, 19, 27) falls with Mirrer's contention that the evidence was insufficient to establish his fraudulent intent. Mirrer contended below that the prosecutor had argued falsely that Mirrer agreed to sign the tax opinion after only a three-hour review, but the Court of Appeals found that the trial evidence supported the prosecutor's argument (Mirrer Grand Jury Statement: 8071; Ryan: 4571-72; Connor: 7351-52, 7424-26)(8a). The court also found, citing Donnelly v.

DeChristoforo, 416 U.S. 637, 645 (1974), that even if the prosecutor did misrepresent, his brief argument on this point would not have rendered the trial fundamentally unfair, a necessary condition for habeas corpus relief. Nothing in this situation even remotely warrants further review by this Court.

Finally, the Court of Appeals rejected Mirrer's severance claim without comment, as "without merit" (10a). Judge Sand, rejecting the same claim, noted the discretionary nature of a motion to sever (62a), and found that there was no abuse of discretion in this case because Mirrer's joinder with his co-defendants caused him no substantial prejudice and did not deprive him of a fair trial (62a-63a, 67a).

In reaching this conclusion, Judge Sand emphasized several salient

facts: Mirrer had been indicted jointly with five co-conspirators (64a), much of the evidence was admissible against Mirrer as well as his co-defendants (64a), Mirrer was not a "silent partner" but played a central role in the conspiracy (91a), and his co-defendants' conduct and statements were "quite important" to prove Mirrer's guilt (65a). Judge Sand also noted that, when evidence was not admissible against Mirrer, the jury was properly instructed to that effect (64a); and he found that Mirrer's defense was not in fact antagonistic to that of his co-defendants (66a-67a). Finally, Judge Sand stressed the State's compelling interest in avoiding multiple trials in this outsized case, noting that the joint trial lasted three months and involved fifty-six witnesses and hundreds of documentary exhibits (63a, 67a).

The judge's reasoning on all these points was well supported by the record and well based in legal precedent (see 62a-67a and 89a-92a and cases there cited), and the Court of Appeals adopted it. In this situation, too, Mirrer offers nothing which supports a grant of certiorari. Indeed, Mirrer does not seriously argue his severance claim, merely asserting at one point that he suffered substantial prejudice from the joint trial because the prosecutor stated in summation that all the defendants, including Mirrer, were involved in a "swindle" (P14-15).

3. As if to recognize that this Court is unlikely to grant certiorari on his mere claim that the Court of Appeals was wrong, Mirrer argues that "the Second Circuit has rendered conflicting opinions by two different

panels on the issuance of a Writ of Habeas Corpus," and he claims that this alleged conflict raises "a significant question of law" about "the basis for granting a writ" (P22-23). The conflicting opinions to which Mirrer refers are those in Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978), cert. denied, 442 U.S. 945 (1979) (Wilson I), and Wilson v. Henderson, 742 F.2d 741 (2d Cir. 1984), rev'd sub nom. Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616 (1986) (Wilson II). In the Wilson case, a habeas corpus petitioner, Wilson, alleged that the police had violated his Sixth Amendment right to counsel by placing an informant, one Benny Lee, in his cell with instructions not to question Wilson but to "keep his ears open" for information which could lead to Wilson's accomplices in a felony murder.

Wilson at first gave Lee an exculpatory account of his presence at the scene of the crime; but later, after Lee responded that Wilson's story "didn't sound too good," Wilson confessed his involvement in the murder. 106 S.Ct. at 2619-20. In Wilson I, the Court of Appeals for the Second Circuit refused to find a Sixth Amendment violation and denied Wilson's petition. 584 F.2d at 1189-91. Later, after this Court's decision in United States v. Henry, 447 U.S. 264 (1980), Wilson submitted a second petition advancing the same claim; and in Wilson II a different panel of the Court of Appeals granted Wilson's petition, only to be reversed by this Court in Kuhlmann v. Wilson, supra.

Mirrer's argument based on these facts is puzzling. Mirrer does not claim that the "conflict" between Wilson

I and Wilson II bears on any issue in the instant case, and in fact there is no Sixth Amendment issue here. Further, any "conflict" between the two Wilson decisions was resolved by this Court's reversal of Wilson II. Rather, Mirrer points to the fact that two of the judges in Wilson II, Judges Timbers and Van Graafeiland, also sat in the instant case; and he argues:

> The fact that there was disagreement between two separate panels within the same Circuit on the same matter wherein two Circuit Judges who heard petitioner's case served on the panel that was reversed by this Court, gives rise to justification for granting this Writ of Certiorari, particularly where there is a clear showing that the career of a professional was unjustly ruined due to misguided and irreconcilable judicial determinations (P24).

But there have been no "irreconcilable judicial determinations" in this case,

and the fortuity that two of Mirrer's judges also sat on Wilson II does not favor Mirrer's petition for certiorari.

Mirrer also asserts that the four-justice plurality in Kuhlmann "expressed the view that habeas relief is available where a showing of innocence is made" (P23), a point Mirrer apparently considers favorable to his case because he assertedly "made a clear showing of innocence that was ignored" (P22). Mirrer is misreading Kuhlmann. The Kuhlmann plurality held only that, where a habeas corpus petitioner files successive petitions asserting the same claim, the court should entertain the second petition "only where the petitioner supplements his constitutional claim with a colorable showing of factual innocence." 106 S.Ct. at 2627. This procedural proposition has nothing to do

with the instant case, which involves only one petition. More fundamentally, Mirrer has not made a "colorable showing of factual innocence." As the Court of Appeals found, Mirrer's guilt was sufficiently established if a rational jury could find him guilty beyond a reasonable doubt, and that requirement was plainly met (see pages 23-26 above).

In sum, nothing in the alleged "conflict" between Wilson I and Wilson II, or in the plurality opinion in Kuhlmann, justifies a grant of certiorari in this case.

4. Finally, Mirrer's petition can be denied as untimely. The Court of Appeals rendered judgment on November 25, 1986, and Mirrer moved for rehearing ten days later. Mirrer's time for filing his petition began running on March 24, 1987, the day the Court of Appeals denied his

motion for rehearing (3a-4a), Rules of the Supreme Court of the United States (1980), Rule 20.4; United States v. Healy, 376 U.S. 75, 77-80 (1964); and it elapsed ninety days later, on June 22, 1987. Rules of the Supreme Court (1980), Rule 20.2; 28 U.S.C. §2101(c); Stern, Gressman & Shapiro, Supreme Court Practice (Sixth Ed. 1986) §6.3. Mirrer did not file his petition until August 4, 1987, forty-three days late.

Mirrer maintains that his petition is timely because he moved for reconsideration of his motion for rehearing, the Court of Appeals denied this second motion on June 5, 1987 (1a-2a), and he filed sixty days later (P2). But Mirrer's motion for reconsideration did not affect the finality of the judgment below, as did his motion for rehearing, United States v. Healy, 376

U.S. at 78, and it therefore did not suspend the running of his time to file a petition. Compare the instant case with Gypsy Oil Company v. Escoe, 275 U.S. 498, 498-99 (1927). A petitioner for certiorari should not be able to obtain successive extensions of his time to file simply by making successive motions for reconsideration and having them denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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